QUESTIONS PRESENTED

1.

Did the Eleventh Circuit Court of Appeals properly vacate the stay of execution because Petitioner's abusive conduct, offering no reason for the six year refusal to pursue state and federal remedies, offering no valid excuse for the manipulative practice of waiting until the day of his scheduled execution to seek relief, and filing a petition for the explicit purpose of delaying the execution, disentitled him to the equitable remedy of habeas corpus?

2.

Did Petitioner have adequate notice of the basis for the ruling of the Eleventh Circuit Court of Appeals because the Court relied on long-standing equitable principles and created no substantial change in the law?

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MISCELLANEOUS AUTHORITIES

No. 95-5015

In The

Supreme Court of the United States

October Term, 1995

LARRY GRANT LONCHAR,

Petitioner,

v.

A.G. THOMAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioner, Larry Grant Lonchar, was indicted in DeKalb County, Georgia, for the malice murders of Charles Wayne Smith, Steven Smith and Margaret Sweat and the aggravated assault of Charles Richard Smith. Following a trial by jury, Petitioner was found guilty on three counts of murder, one count of aggravated assault and received a sentence of death by electrocution for the three counts of murder and a sentence of twenty years imprisonment for the aggravated assault conviction. Pursuant to the automatic appeal procedure the convictions

and sentences were affirmed on July 13, 1988. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988).

On March 8, 1990, an order scheduling a new execution time period was entered by the Superior Court of DeKalb County, Georgia, scheduling the execution for March 23, 1990, through March 30, 1990. Shortly thereafter, Mr. Michael Mears filed a "Motion to Require that Mr. Lonchar be Certified Competent Prior to the State of Georgia Joining His Attempt to Commit Suicide" in the criminal case in DeKalb County. The hearing was held on that motion on March 13, 1990. The DeKalb court issued an order on March 14, 1990, concluding that the court did not have jurisdiction or venue to consider the action and transferred the motion to the Superior Court of Butts County "for further proceedings as determined necessary by the Court."

Michael Mears then filed an emergency motion for stay of execution in the Supreme Court of Georgia and also filed a notice of appeal from the original order scheduling the execution time period. On March 20, 1990, the Supreme Court of Georgia deemed that the motion to stay the execution was premature and dismissed the motion without prejudice so that an application could be made in the Superior Court of Butts County, Georgia, "where the matter is presently pending."

(a) First Next Friend State Petition

A hearing was tentatively scheduled in the Superior Court of Butts County on March 21, 1990, based on suggestions that a petition was being filed under O.C.G.A.

§ 17-10-60. On the day of the scheduled hearing, counsel for the Respondent was served with a motion for a stay of execution and a petition for a writ of habeas corpus filed by Mr. Mears as counsel for Mr. Lonchar's sister, Chris Lonchar Kellogg. (J.A. 66). At the hearing, Mr. Mears, representing Ms. Kellogg, sought to have the Court allow Ms. Kellogg to proceed as next friend and sought to have the Court declare Petitioner Larry Lonchar incompetent in order that the next friend petition might proceed. Mr. Mears acknowledged that he was not asserting that Petitioner was incompetent to be executed. Petitioner emphatically stated that he opposed any petition being filed and specifically stated that he did not have counsel representing him. (J.A. 429-431). On March 28, 1990, the Superior Court of Butts County held a hearing to determine Petitioner's competency to waive any further proceedings. The court entered a written order on March 29, 1990, concluding from the evidence before it that Petitioner was competent. (J.A. 2). Thus, the Superior Court of Butts County denied the motion for a stay of execution and declined to allow Ms. Kellogg to proceed.

Counsel for Ms. Kellogg then filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. That court granted the stay of execution on March 29, 1990, to allow the court to receive and consider the transcript of the hearing in the state habeas corpus court. On May 2, 1990, the Court issued an opinion dismissing the application for a certificate of probable cause to appeal and terminating the stay of execution. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 830 (1990). In its opinion, the Supreme Court of Georgia specifically found

that Petitioner was "not psychotic, has normal intelligence and is competent to decide not to appeal further." *Id.* at 184. A subsequent petition for rehearing which was filed on May 14, 1990, was denied by the Supreme Court of Georgia on May 23, 1990.

Mr. Mears then filed a petition for a writ of certiorari in this Court on behalf of Ms. Kellogg. In addition, counsel for Ms. Kellogg sought to consolidate the case with one pending from the State of Texas. On October 1, 1990, the request for consolidation and the petition for a writ of certiorari were denied and the petition for rehearing was denied on December 3, 1990. *Kellogg v. Zant*, 498 U.S. 890, *reh'g denied*, 498 U.S. 1008 (1990).

(b) First Next Friend Federal Petition

On October 23, 1990, Ms. Kellogg, by Attorney Mears, filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia seeking to proceed of behalf of Petitioner Larry Lonchar. After various depositions were taken by both parties, an evidentiary hearing was held on November 12, 13, and 14, 1991. The district court entered an order and judgment on February 18, 1992, granting Respondent's motion to dismiss for lack of standing. (J.A. 20). Ms. Kellogg filed a notice of appeal on February 20, 1992, and an application for a certificate of probable cause to appeal. On March 12, 1992, the district court granted a certificate of probable cause to appeal.

The Eleventh Circuit Court of Appeals entered an opinion on November 13, 1992, affirming the decision of

the district court and finding that Ms. Kellogg lacked standing to proceed on behalf of the present Petitioner. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992).

On or about December 2, 1992, Ms. Kellogg filed a petition for rehearing and suggestion for rehearing en banc which was denied on January 12, 1993. Ms. Kellogg filed a motion for stay of the mandate which was denied by the Eleventh Circuit Court of Appeals on January 25, 1993, and the judgment was issued as the mandate on that same date.

On or about February 4, 1993, Ms. Kellogg submitted a petition for a writ of certiorari to this Court. On February 5, 1993, the state trial judge signed a new execution order scheduling the time period for Mr. Lonchar's execution between noon on February 24, 1993, and noon on March 3, 1993. Ms. Kellogg filed a motion for stay of execution in the Supreme Court of Georgia which was denied on February 13, 1993. Certiorari was denied by this Court on February 24, 1993. *Kellogg v. Zant*, ___ U.S. ___, 113 S.Ct. 1378 (1993). On that same date, the State Board of Pardons and Paroles denied clemency. *See* Ga. Const. Art. IV, Sec. II, Para. II(d).

(c) 1993 State Petition Signed by Petitioner

Also on February 24, 1993, less than an hour before his scheduled execution, Petitioner consented to a petition being filed in his behalf and a petition was filed in the Superior Court of Butts County. A stay of execution was granted by the Superior Court of Butts County. On April 6, 1993, the case was assigned to the Honorable

Kristina Cook-Connelly, Judge of the Superior Court of the Lookout Mountain Judicial Circuit. On July 28, 1993, counsel for the Respondent warden wrote a letter to the court advising the court that she had received a letter from Petitioner stating that he wanted to dismiss his petition and proceed with his execution. Counsel for the Respondent subsequently received another letter from Petitioner, stating that he did not want to be represented by either Mr. Stafford Smith or Mr. Bayliss.

A hearing was held on June 23, 1994, at which time Petitioner specifically advised the court that he did not want to be represented by Mr. Bayliss or Mr. Stafford Smith and that he wanted to dismiss the petition. (J.A. 449). On January 25, 1995, an order was filed dismissing the petition without prejudice at Petitioner's request. (J.A. 34). On February 15, 1995, Mr. Bayliss and Mr. Stafford Smith filed a motion for reconsideration and a motion for leave to file an *ex parte* proffer, neither of which was authorized by Petitioner. Respondent opposed those motions as they were not authorized by Petitioner and because Mr. Stafford Smith and Mr. Bayliss were no longer Petitioner's "habeas counsel." On February 23, 1995, the court signed an order denying the motion for reconsideration and motion for leave to file an *ex parte* proffer. (J.A. 33).

On February 24, 1995, Mr. Bayliss and Mr. Stafford Smith filed an application for a certificate of probable cause to appeal and notice of appeal, again without authorization from Petitioner and not acting as next friend for any party. On April 6, 1995, the Supreme Court of Georgia denied the application for a certificate of probable cause to appeal. Respondent then filed a motion

to issue the remittitur because the application was an unauthorized pleading filed by attorneys who no longer represented Petitioner. On May 4, 1995, the Supreme Court of Georgia issued two orders, one denying Mr. Stafford Smith's motion for reconsideration of the denial of the application for a certificate of probable cause, and one granting Respondent's motion to issue the remittitur. On May 17, 1995, the remittitur was made the judgment of the Superior Court of Butts County.

On May 8, 1995, the Attorney General's office received a letter dated May 7, 1995, from Mr. John Matteson stating that he was representing Mr. Larry Lonchar and attaching a letter from Larry Lonchar to Mr. Matteson "hiring" him.

Subsequently, Mr. Stafford Smith and Mr. Bayliss filed an unauthorized petition for a writ of certiorari in this Court, without an affidavit of poverty from Petitioner. The Court required that a motion be filed requesting leave to file without the affidavit. On May 30, 1995, the Court specifically denied the motion and returned the petition for a writ of certiorari.

(d) Federal Civil Rights Complaint

On April 16, 1995, Petitioner signed a motion to be substituted as a plaintiff in a pending civil rights action in the United States District Court for the Northern District of Georgia in the case of *Nicholas Ingram and Larry Grant Lonchar v. Ault*, No. 1:95-CV-875-HTW. That civil rights complaint specifically raised the same allegations pertaining to the method of execution as have been presented in

the instant petition. On June 3, 1995, the district court denied the motion to substitute parties.

(e) June 1995 Execution Window

On June 8, 1995, Judge Robert J. Castellani of the Superior Court of DeKalb County entered an order setting a new time frame for Petitioner's execution beginning at noon on June 23, 1995, and ending at noon on June 30, 1995. The Department of Corrections set the date and time for execution for June 23, 1995, at 3:00 p.m.

On June 9, 1995, Mr. Larry Lonchar made a statement under penalty of perjury stating that Mr. Matteson represented him, that no other attorney was authorized to represent him, and that he did not want any further attempts made to stop his execution. On June 12, 1995, Mr. Mears wrote Judge Castellani to "suggest that the Court voluntarily disqualify itself" and to vacate the execution order.

On or about June 13, 1995, Mr. Mears, signing as counsel for Milan Lonchar, Jr., Petitioner's brother, without asking leave to file as next friend or making any assertions that Larry Lonchar was incompetent, filed a "Motion to Disqualify Judge" and a "Motion to Vacate Void Execution Order" in the Superior Court of DeKalb County. (J.A. 164). On June 14, 1995, the State, through the District Attorney's office, filed a motion to dismiss, asserting a lack of standing and that the motions were without merit on their face. On that same date, without addressing the timeliness or sufficiency of the motion to

disqualify, Judge Castellani entered an order directing that the motion be heard by another judge.

On June 20, 1995, a hearing was held in the Superior Court of DeKalb County. At that hearing, Mr. Mears filed a "Motion for Leave to Proceed as Next-Friend" on behalf of Milan Lonchar, Jr. After hearing argument from Mr. Mears and the District Attorney, Judge Robert Mallis ruled that Milan Lonchar lacked standing to proceed and, even if he had standing, there was no basis for disqualification because Judge Castellani had only performed a ministerial act in setting the execution "window" and had not performed any discretionary acts. The court entered a written order that afternoon. Mr. Mears, as counsel for Milan Lonchar, Jr., apparently filed a notice of expedited appeal in that court.

(f) Second Next Friend Petition

Shortly after 3:00 p.m. on June 20, 1995, counsel for Respondent received the next friend petition for writ of habeas corpus and a motion for an order permitting a psychological evaluation of Petitioner. (J.A. 176). A hearing was held before the Honorable E. Byron Smith, Judge of the Superior Court of Butts County, sitting in the Superior Court of Monroe County, at approximately 10:30 a.m., June 21, 1995. At that hearing, Petitioner again stated he wanted to proceed with the execution and stated that he *did not* want to be evaluated and that he was competent. (J.A. 473). The court ruled from the bench and entered a written order at 12:30 p.m. finding that Milan Lonchar lacked standing and noting that Petitioner had stated in open court that he did not want to be

evaluated and wanted the execution to be carried out (J.A. 35).

Milan Lonchar filed a notice of appeal that day and served an application for certificate of probable cause to appeal and a motion for a stay of execution on counsel for Respondent at 5:50 p.m. June 21, 1995.

On June 22, 1995, the Supreme Court of Georgia entered orders affirming the decision of the Superior Court of DeKalb County, denying the application for a certificate of probable cause to appeal from the next friend habeas corpus action and denying the motion for stay of execution. In a concurring opinion, Justice Sears concluded, "I believe Larry Lonchar has knowingly, intelligently and competently waived his right to seek all post-conviction relief concerning his convictions and sentence of death. . . . Larry Lonchar thus has forfeited all of his rights to assert the issues that Milan Lonchar now seeks to assert on his behalf." (J.A. 37-8).

(g) Second Next Friend Federal Petition

At approximately 6:00 p.m. that afternoon, Milan Lonchar, by counsel, filed a next friend federal habeas corpus petition. At approximately 10:30 p.m. that same evening, the district court dismissed the petition for lack of standing and denied the motion for a stay of execution. (J.A. 39). On June 23, 1995, the Eleventh Circuit Court of Appeals denied a certificate of probable cause to appeal and the motion for a stay of execution shortly after 2:00 p.m. (J.A. 50). On June 23, 1995, this Court denied a stay of execution and dismissed the petition for a writ of

certiorari for lack of jurisdiction which had sought to challenge the dismissal of the next friend habeas corpus petition.

(h) State Court Civil Rights Complaint/1995 State Petition Signed by Petitioner

On June 23, 1995, a civil rights complaint was filed in the Superior Court of Butts County, Georgia, on behalf of the Petitioner seeking only to challenge the method of execution. Also on that morning, counsel for Respondent received telephonic notice that Petitioner had "consented" to a state habeas corpus petition being filed and that a hearing was to be held that day at 1:00 p.m. in Butts County. Counsel for Respondent did not receive a copy of the petition until obtaining one from the warden immediately before the hearing began. (J.A. 308). At the hearing, although stating that he was adopting the allegations of the petition, Petitioner continually stated he only wanted to have time to see if the General Assembly of Georgia would change the method of execution. As the execution was scheduled for 3:00 p.m., the court entered a temporary stay indicating a ruling would be forthcoming the next week before the execution window expired. (J.A. 487). On that same date, Petitioner filed an emergency motion for stay of execution in the Supreme Court of Georgia noting the attempt to file a state habeas corpus petition.

On June 26, 1995, the Superior Court of Butts County entered an order denying the stay of execution and dismissing the state habeas corpus petition. Later that afternoon, the court denied the civil rights complaint for failure to state a claim upon which relief can be granted.

On June 27, 1995, at approximately 9:30 a.m., Petitioner delivered to counsel for Respondent motions for reconsideration from the orders vacating the stay of execution, dismissing the habeas corpus petition and denying the civil rights complaint. On that same date, the Superior Court of Butts County denied the motion for reconsideration as to all actions.

On June 27, 1995, Petitioner filed a motion for a stay of execution and application for a certificate of probable cause to appeal in the Supreme Court of Georgia. Late that afternoon the court denied probable cause to appeal, the motion for stay of execution and the earlier filed emergency motion for a stay of execution.

(i) June 1995 Larry Lonchar Federal Petition

At approximately 7:25 p.m. on June 27, 1995, counsel for Respondent was served with a federal habeas corpus petition signed by the Petitioner. That petition was filed the next morning on June 28, 1995. Respondent filed a response in opposition and a motion to dismiss due to Petitioner's abusive conduct. A hearing was held in the district court shortly before 11:00 a.m. and the district court gave Petitioner an opportunity to respond to the allegations of abuse and heard testimony from the Petitioner and Clive Stafford Smith. (J.A. 501). The court also

received supplemental briefs from both parties that afternoon. The court entered a temporary stay pending consideration of the motion to dismiss and the brief. At approximately 9:40 p.m., the district court entered an order denying the motion to dismiss and granting the motion for a stay of execution. (J.A. 53).

The next morning on June 29, 1995, the Respondent filed a motion to vacate the stay in the United States Court of Appeals for the Eleventh Circuit. (J.A. 374). Out of an abundance of caution, Respondent also filed a notice of appeal from the order of the district court. On that same date, the Eleventh Circuit Court of Appeals entered an order vacating the stay of execution and providing that its mandate would issue at 5:00 p.m. *Lonchar v. Thomas*, 58 F.3d 590 (11th Cir. 1995).

Petitioner filed a suggestion for rehearing en banc in the Eleventh Circuit Court of Appeals and also filed a petition for a writ of certiorari in this Court. Later that evening, this Court granted the stay of execution and granted the petition for a writ of certiorari. (J.A. 552). The Eleventh Circuit Court of Appeals has subsequently concluded that it had no authority to act upon the suggestion for rehearing *en banc* and would not do so as this Court has jurisdiction over the case.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit Court of Appeals properly vacated the stay of execution entered by the district court in this action due to the Petitioner's abusive conduct. Although this case does not present the classic example

of "abuse of the writ" and does not fall within the traditional parameters of either Rule 9(b) or Rule 9(a) of the Rules Governing Section 2254 Cases, Petitioner's conduct has in fact disentitled him to the relief he is presently seeking. Habeas corpus is an equitable remedy and petitioners seeking to invoke equitable relief are accountable for their own conduct and must come into the proceeding with "clean hands" in order to obtain equitable relief.

Petitioner's focus on the fact that this is his "first" federal habeas corpus petition is unavailing. Petitioner has still engaged in abusive conduct over the past six years through his deliberate failure to participate in cases when he was present in court, through his repeated insistence that he did not want to file habeas corpus actions, through his waivers of those actions and through his blatant manipulation of the judicial system by waiting until less than one hour before his scheduled execution on two separate occasions to decide to file habeas corpus proceedings. The obvious delay in this proceeding has been directly attributable to Petitioner's own actions in refusing to participate in the judicial process until the eleventh hour on two separate occasions.

General principles of equity unquestionably apply to habeas corpus cases. Therefore, Petitioner's conduct is key to the resolution of the issues before the Court. The costs associated with the Great Writ are particularly high in this case. To allow the Petitioner to engage in this repetitively abusive conduct would serve only to further undermine confidence in the judicial system and would reflect a disregard for the concerns of comity and finality.

Petitioner's reasons for circumventing the consequences of his own actions are insufficient to allow him to continue to manipulate the judicial system. It is not solely the delay in filing the petition that is abusive, but the delay considered in conjunction with the six years of refusal to participate in legal proceedings, the prior dismissal of his state habeas corpus action, the acts of waiting until hours before his scheduled execution on two separate occasions to file a petition and the stated purpose for the present petition – delay to seek only to change the method of execution.

Petitioner has also not shown any detrimental reliance which would excuse his conduct. Ample warnings were given of the possible consequences of his conduct and he has never stated that he has acted in reliance on any advice from the courts or the state in deciding either to dismiss his habeas corpus petition or in refusing to file a petition until hours before his scheduled execution. Thus, there was no reasonable reliance on any advice that would justify the conduct of the Petitioner.

Petitioner's motive or purpose in filing this petition is an appropriate consideration under the equitable principles governing habeas corpus. His stated purpose is only to delay the execution. Consideration of that purpose in this setting does not deny Petitioner access to the courts.

Finally, the Eleventh Circuit did not establish a new rule applicable to Petitioner's case and, therefore, there was no lack of notice. Petitioner has consistently had notice of the long-standing applicability of equitable principles to habeas corpus actions.

Petitioner's actions are not those of one seeking in good faith to have his convictions and sentences reversed and seeking to pursue equitable relief, but are rather the actions of one who is simply seeking to delay a presumptively lawful sentence of death. Even if Petitioner's intent has not been to manipulate the system, he has done so through his own actions, through the actions of his attorneys and through the actions of his family. To allow this type of abusive conduct would simply encourage others on death row to use this as a creative method to accomplish the goal of delay and to postpone consideration of any substantive issues until such time as the state either has lost the ability to appropriately defend those claims or, even if relief is granted, until such time as a retrial would be impracticable if not impossible.

The issue before this Court is whether general principles of equity can be used to examine the conduct of a litigant seeking equitable relief and whether, examining objective and subjective factors, Petitioner's conduct should disentitle him to that equitable relief. Due to the extreme costs of the writ of habeas corpus on such issues as finality and the public's confidence in the judicial system, the conduct in this case should not be tolerated.

ARGUMENT

I. PETITIONER'S ABUSIVE CONDUCT DISENTITLES HIM TO THE EQUITABLE RELIEF OF HABEAS CORPUS AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY VACATED THE STAY OF EXECUTION.

The critical question for resolution by this Court is whether the Eleventh Circuit Court of Appeals acted

properly in vacating the stay of execution entered by the district court based upon a finding that Petitioner, through his own conduct, had disentitled himself to the equitable remedy of habeas corpus. Respondent submits that even though this is technically the first federal habeas corpus petition actually signed by the Petitioner himself, equitable principles bar his misuse of the Great Writ in an unveiled attempt to simply delay his execution with no legitimate attempt to have the issues of the petition substantively reviewed. Petitioner has engaged in a prolonged and varied history of abusive conduct and does not have the "clean hands" necessary for equitable relief.

This Court has on numerous occasions set forth the extensive history underlying the Great Writ. *McCleskey v. Zant*, 499 U.S. 467, 477 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Price v. Johnston*, 334 U.S. 266 (1948); *Wainwright v. Sykes*, 433 U.S. 72 (1977). From those and other cases, certain key principles emerge. English common law originally defined the substantive scope of the writ of habeas corpus and the original writ could be used by federal prisoners attacking confinement which was imposed by a court without jurisdiction or "detention by the Executive without proper legal process." *McCleskey v. Zant* at 478. Furthermore, common law principles of res judicata did not apply to a denial of habeas corpus relief. *Id.* at 479. This common law principle was subsequently reaffirmed by the Court's holdings in *Salenger v. Loisel*, 265 U.S. 224 (1924), and *Wong Doo v. United States*, 265 U.S. 239 (1924).

Underlying all habeas corpus cases, however, is a fundamental "principle that habeas corpus is, at its core,

an equitable remedy." *Schlup v. Delo*, ___ U.S. ___, 115 S.Ct. 851, 863 (1995). It is based on this equitable nature of the writ of habeas corpus that the Court has precluded a strict application of res judicata principles. *Id*. Thus, as clearly delineated in *Sanders v. United States*, 373 U.S. 1 (1963), and *McCleskey v. Zant*, equitable principles govern the writ of habeas corpus, including "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *McCleskey* at 484-5, quoting *Sanders v. United States* at 17-18; *Murray v. Carrier*, 477 U.S. 478, 512 n.18 (1986) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles. [Cit.] Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."). In *Sanders* the Court gave examples of abuse of the writ including a deliberate withholding of grounds at the time of the filing of the first application and a deliberate abandonment of one of the grounds at the first hearing. The Court went on to emphasize, however, "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders* at 18.

This Court has also focused on the concerns raised by the application of the writ of habeas corpus, many of which are implicated in this proceeding.

> To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is

> deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). And when a habeas petitioner succeeds in obtaining a new trial, the " 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," *Kuhlmann v. Wilson, supra*, at 453, prejudice the government and diminish the chances of a reliable criminal adjudication. Though *Fay v. Noia, supra*, may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality.

McCleskey v. Zant, 499 U.S. at 491. As noted by Chief Justice Burger, "[f]ew things have so plagued the administration of criminal justice, or contributed more to lower public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (Burger, C.J., dissenting).

This Court has also observed the more limited nature of habeas corpus review as opposed to direct appeal. "Direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In *Barefoot*, the Court went on to emphasize that federal habeas was even less "a means by which a defendant is entitled to delay an execution indefinitely." *Id*.

In reviewing issues of retroactivity, the Court has also reiterated the concerns of finality. "Without finality,

the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.' " *Teague v. Lane*, 489 U.S. 288, 310, *reh'g denied*, 490 U.S. 1031 (1989) (emphasis in original), quoting Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970).

Members of this Court have frequently expressed concern about the utilization of the writ of habeas corpus to delay state capital sentences and to interfere with the states' judicial processes. *Collins v. Byrd*, ___ U.S. ___, 114 S.Ct. 1288 (1994) (Scalia, J., dissenting from the denial of the application to vacate stay) ("the decision whether to assert jurisdiction over a habeas petition calls for an exercise of the court's equitable discretion . . . and the petitioner's delay in filing is a factor the court may consider"); *Stephens v. Kemp*, 464 U.S. 1027 (1984) (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting from the denial of the motion to vacate stay) ("Once again, as I indicated at the outset, a typically 'last minute' flurry of activity is resulting in additional delay of the imposition of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow."). *See also Wainwright v. Spenkelink*, 442 U.S. 901, 903 (1979) (Rehnquist, J., dissenting from the denial of the motion to vacate stay) ("When a State has taken all steps required by our capital cases, its will, as represented by the legislature that authorized the imposition of the death sentence and by the juries and courts that imposed and upheld it,

must be carried out. Constant and repeated frustration of the state's lawful action in such a situation is contrary to the underlying assumptions of our federal system.").

More recently, and specifically in considering an allegation under 42 U.S.C. § 1983 that execution by lethal gas was cruel and unusual punishment, the Court specifically declined to enter a stay. "Whether his claim is framed as a habeas petition or as a § 1983 action, [the plaintiff] seeks an equitable remedy. Equity must take into consideration the state's strong interest in proceeding with its judgment and [the Petitioner's] obvious attempt at manipulation." *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992) (per curiam). In that case the Court also held that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*

In *Engle v. Isaac*, 456 U.S. 107, 127, *reh'gs denied*, 456 U.S. 1001, 457 U.S. 2976 (1982), this Court also emphasized the "significant costs" associated with collateral review which "extends the ordeal of trial for both society and the accused." Furthermore, "[l]iberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one 'time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence.' " *Id.* at 127, quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The Court has emphasized the protections provided for the accused and that habeas corpus, "rather than enhancing these safeguards . . . may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself." *Engle v. Isaac* at 127. Thus, "writs of habeas

corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Id.* at 127-8. Further, "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 128. Thus, the Court recognized, "the Great Writ imposes special costs on our federal system." *Id.*

It is beyond dispute that equitable principles govern the application of the writ of habeas corpus, that equitable considerations apply in determining whether the Petitioner is entitled to the writ and that this Court should consider the interests of the state in the finality of its convictions as well as the cost to society and to the federal judicial system of the continued litigation in this action.

A court clearly has the power to entertain a petition for a writ of habeas corpus challenging a state court conviction and sentence. 28 U.S.C. § 2244 and 2254. The issue in this case is what limitations are placed on that power or more specifically, "what standards should govern the exercise of the habeas court's equitable discretion in the use of this power?" *Reed v. Ross*, 468 U.S. 1, 9 (1984). "Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts

in developing the exhaustion rule." *Murray v. Carrier*, 477 U.S. at 512 n.18. In making the determination of whether it is appropriate to exercise the power provided, the Court necessarily weighs the interest in providing a forum "for the vindication of the constitutional rights of state prisoners" and the interest of the state "in the integrity of its rules and proceedings and the finality of its judgments." *Reed v. Ross* at 10.

To preserve the integrity of the writ, this Court has placed certain limitations on the power to grant the writ. Specifically, in deciding to honor state procedural defaults, this Court has emphasized that there was no dispute about the power to entertain the application but rather whether the exercise of the power was appropriate under certain circumstances. "This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." *Francis v. Henderson*, 425 U.S. 536, 539 (1976). In exercising the power, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [should] always [endeavor] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 541-2, quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971). *See also Wainwright v. Sykes*, 433 U.S. 72 (1977) (application of procedural default principles to a contemporaneous objection rule); *Engle v. Isaac* (application of procedural default to failure to raise issues on appeal); *Wainwright v. Sykes* at 79 (noting that Court in *Stone v. Powell*, 428 U.S. 465 (1976), "removed from the purview of a federal habeas court challenges resting on the Fourth

Amendment, where there has been a full and fair opportunity to raise them in the state court"). In fact, even the exhaustion of state remedies requirement was first established by this Court in *Ex parte Royall*, 117 U.S. 241 (1886). This Court recognized "while there was power in the federal courts to entertain such petitions, as a matter of comity they should usually stay their hand pending consideration of the issue in the normal course of the state trial." *Wainwright v. Sykes* at 80. Although these particular matters are not identical to the one addressed herein, these cases show this Court's "historic willingness to overturn and modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes* at 81.

In the instant case, Respondent is not relying on a specific statutory provision enacted by Congress such as 28 U.S.C. § 2244 or the Rules Governing Section 2254 Cases. Neither provision directly addresses the factual and procedural scenario presented in this case. In fact, Congress has been silent on the question of whether this Court may decline to review a "first" habeas corpus petition filed in federal court and actually signed by a petitioner when he has clearly engaged in abusive conduct, outrageous delay, and has effectively manipulated the judicial system, thus engaging in conduct that in a "successive" petition would clearly disentitle him to relief. Under these circumstances, when Congress has been silent on a specific matter, this Court should decline to draw any inferences from the failure to address what is obviously an unusual situation. This Court has previously noted, "[w]e have filled the gaps of the habeas

corpus statute with respect to other matters. . . . As always, in defining the scope of the writ, we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefit of its application on collateral review." *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1719 (1993) (determining the appropriate harmless error standard to apply on collateral review). Thus, the mere fact that there is no specific statutory provision dealing with the precise situation in this case should not prohibit the Court from determining that the general equitable principles applicable to habeas corpus actions bar consideration of the instant petition.

Respondent submits that this Court may apply either an objective test under the "cause and prejudice" analysis or a subjective equitable analysis and still conclude that the Eleventh Circuit properly vacated the stay of execution. The cause and prejudice analysis has been applied by this Court to review procedural defaults and traditional abuses of the writ and would be equally applicable to the circumstances in this case. Respondent is not suggesting that this Court rewrite Rule 9(a) addressing delay or Rule 9(b) referring to successive petitions, but rather, that under the unusual circumstances of this case, it would be appropriate to examine Petitioner's cause for failing to file his own federal habeas corpus action for some six years and filing it only at the eleventh hour, when he had ample opportunity during that time to join in state and federal habeas corpus actions. Certainly, no cause has even been suggested. To satisfy the cause requirement, this Court has consistently recognized that

there must be a showing of some "external impediment" that would have prevented him from filing this petition and raising these claims. *See Murray v. Carrier*. The only so-called "impediments" were Petitioner's own deliberate choice not to pursue any of the issues raised in the instant petition earlier and Petitioner's assumption there was no reason to file a petition because the Georgia General Assembly would not change the statutory method for execution. This clearly does not establish cause.

Even if this Court were not to apply the "cause and prejudice" analysis, a subjective analysis under the equitable principles governing habeas corpus cases supports the decision by the Eleventh Circuit Court of Appeals and virtually mandates this Court's declining to consider this petition. Every court considering the Petitioner's attempts to delay his execution has found Petitioner's sole purpose in pursuing this litigation has been for delay and that Petitioner's conduct is abusive. The state court and the district court made specific factual findings that are pertinent to this analysis. Specifically, the state court declined to consider the merits of the petition based upon a finding that Petitioner's sole purpose in pursuing the appeal was to delay so that he could attempt to have the method of execution changed. The district court found the following facts:

> Lonchar was aware of the availability of habeas corpus relief during this entire period and had discussed it with his attorney. Lonchar offered no reason for his failure to pursue review of his sentence except that he chose not to do so. He was aware of the potential legal arguments and

> their factual predicates. Not only did he decline to pursue further review of his sentence, on at least three occasions he knowingly and voluntarily waived his further review of the sentence in open court.
>
> * * *
>
> Within hours of his execution, Lonchar for the second time filed an application for writ of habeas in the State Courts. He agreed to file the petition after Mr. Stafford-Smith and his other attorneys advised him that the legislature might change the law to allow a different method of execution so that he could donate his organs.
>
> * * *
>
> Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.
>
> * * *
>
> The State has shown that despite 8 years of litigation over these claims, and numerous opportunities to join in the litigation, Lonchar has explicitly refused to bring these claims. In fact, in the first next-friend petition, the Court found that Lonchar made a voluntary and knowing waiver of his right to appeal on the claims. In this petition, Lonchar brings the same claims with the exception of the method of execution, that could have been brought in the prior next-friend petition.

* * *

> Lonchar fails to come forward with either objective or subjective reasons to excuse the conduct [footnote omitted]. Lonchar previously had the opportunity to obtain collateral review of all of the present issues and voluntarily declined to do so. Petitioner's reason for not raising the claims asserted in his habeas petition sooner is that he had just recently been convinced that he may be able to do some good by offering his organs for donation following his execution. This is not sufficient reason for failing to raise these issues when he previously had the opportunity to do so. Lonchar's failure to raise these issues earlier is certainly inexcusable negligence, if not voluntary abandonment.

(J.A. 56-61).

These findings by the district court virtually demanded that the Eleventh Circuit Court of Appeals vacate the stay of execution. As recognized by that court, "[w]e need not be detained, however, by a debate over whether this case is properly characterized as one involving an abuse of the writ or simply a case involving abusive conduct and misuse of the writ"; under either circumstance, "Lonchar does not merit equitable relief." (J.A. 550). There was no reason for Petitioner's refusing to pursue state remedies and to exhaust those state remedies so that he could file a federal petition; there was no reason for refusing to participate in a federal habeas corpus action where Petitioner sat in court for three days refusing to participate; there was no reason for his practice of on two separate occasions waiting until virtually the last hour to seek to pursue state remedies; and the

instant petition has been brought for the explicit purpose of delaying the execution, "not to vindicate his constitutional rights." *Id*.

Respondent submits that this case presents a set of circumstances so egregious as to justify this Court in applying equitable principles to find that no stay of execution should have been entered and there was no basis for considering the petition for writ of habeas corpus filed by the Petitioner. Therefore, Respondent submits that the decision of the Eleventh Circuit Court of Appeals should be affirmed.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED EQUITABLE PRINCIPLES AND GAVE APPROPRIATE CONSIDERATION TO THE PROCEDURAL POSTURE OF THE CASE AND THE FACTUAL CONTEXT TO DETERMINE THAT THE STAY OF EXECUTION SHOULD BE VACATED.

Petitioner sets forth three specific reasons why he alleges the decision of the Eleventh Circuit Court of Appeals is "unsupportable" based upon this Court's precedents. Respondent submits that the Eleventh Circuit properly applied controlling equitable principles and Petitioner has failed to show that he is entitled to the relief he seeks.

A. Delay.

Petitioner first alleges that the dismissal of the instant petition based solely on delay is improper. Respondent has never asserted, nor did the Eleventh

Circuit Court of Appeals find, that delay alone was a sufficient basis for dismissing the instant petition. Clearly, the habeas corpus rules permit the state to move for dismissal of a habeas corpus petition based upon delay when there is a showing that the state has been prejudiced by the delay. Rule 9(a) of the Rules Governing Section 2254 Cases. This Court has specifically recognized that Congress has not yet provided "the State with an additional defense to habeas corpus petitions based on the difficulties that it will face if forced to retry the defendant." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Similarly, Congress has not yet created a statute of limitations for federal habeas corpus proceedings.

In the motion to dismiss submitted to the district court, Respondent did raise a defense of delay or laches, asserting that the equitable nature of habeas corpus should allow the applicability of traditional laches principles. Respondent went on to state, "as the merits of the petition are not being reached at this time, or at least no evidentiary hearing is set, and due to the dilatory filing of this petition by Mr. Lonchar in relation to the scheduled execution, Respondent does not have information to make the showing of prejudice." (J.A. 387). Respondent never conceded that Respondent could not show prejudice, but only that due to the lateness of the hour and the fact that the merits of the petition were not being reached, Respondent did not have information on prejudice at that time. What Respondent has consistently asserted is that the delay in filing is one of many factors to be considered in examining the equitable nature of the relief sought by the Petitioner and whether Petitioner is entitled to that equitable relief. While not barring habeas

corpus actions only on the basis of delay without a showing of prejudice, this Court has referenced the delay in filing in its opinions as a factor in the equitable analysis. *Gomez v. United States District Court*, 112 S.Ct. at 1653 (holding "court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief"). Both the Respondent and the Eleventh Circuit Court of Appeals have alleged this is simply one of many factors to be considered. As noted by the Eleventh Circuit Court of Appeals, "A petitioner's willful delay and manipulation of the judicial system exacerbate [the cost of the writ of habeas corpus]." (J.A. at 549).

Furthermore, delay is but one of many factors that justified vacating the stay of execution and that justify denying relief to Petitioner. Delay is, therefore, an appropriate consideration in weighing the equities in this case.

B. Reliance/Estoppel.

Petitioner also asserts as a second basis for reversing the Eleventh Circuit's decision that, even if the equitable nature of habeas corpus would allow a dismissal under certain circumstances, it should not be permitted in this case because Petitioner allegedly received assurances that his prior actions would not result in a later bar, that the state court petition was dismissed without prejudice and that the "manipulation" was the fault of persons other than the Petitioner himself. Respondent submits that the Petitioner has failed to show any detrimental reliance on any representation by any person, much less by the courts or the state, and further, that the delay and manipulation are attributable to the Petitioner.

In essence, Petitioner is asserting that the state should be estopped from using the equitable nature of habeas corpus based upon representations that have been made to the Petitioner. Petitioner's argument itself seeks to invoke equity as "[e]stoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984). The party asserting estoppel "must have relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable." *Id.* In *Heckler*, the Court even suggested that "the Government may not be estopped on the same terms as any other litigant." *Id.* at 60. In any event, "when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Id.* at 61. Thus, the Petitioner must show that he received advice that would have given him reason to believe that his refusal to participate in prior actions *and* the dismissal of his state habeas corpus petition would not bar *any*, subsequent petition, that the advice was "given under circumstances that should have induced [his] reliance," *Id.* at 64, and that he did in fact rely on that "advice," whether from the court or the state. The record reflects absolutely no such reliance.

In most of the cases cited by the Petitioner, there was either an affirmative misrepresentation, an affirmative statement upon which a party relied or at least an implied statement or representation, such as the *Miranda* warnings, that would have justified reliance. *See, e.g., Doyle v. Ohio*, 426 U.S. 610 (1976); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (comments on silence subsequent to the

giving of *Miranda* warnings). This Court has recognized, however, that the issue becomes not only whether there was reliance in fact, but "whether that reliance was reasonable under the circumstances. . . . " *United States v. Pennsylvania Industrial Chemical Corp*, 411 U.S. 655, 675 (1973).

The first opportunity for any discussion about the consequences of Petitioner's actions actually occurred during the pretrial and trial proceedings. At that time, Petitioner was asserting that he did not want to be present at trial at all and that he knew what the result of the trial would be. The trial court specifically reviewed with the Petitioner the consequences of his not presenting evidence and not being present in the court and gave the Petitioner the opportunity to change his mind at any time. (J.A. 391-417). At the hearing on the motion for new trial, the court also discussed Petitioner's request to waive his automatic direct appeal to the Supreme Court of Georgia. (J.A. 418-421)

The second opportunity arose in the state habeas corpus hearing on the first next friend action which was filed by Petitioner's sister, *Kellogg v. Zant*, No. 90-V-2735. A hearing was held on the motion for stay on March 21, 1990, and that court discussed with the Petitioner the consequences of his actions. Petitioner insisted that he was asking the court to carry out his sentence of death. (J.A. 424). The court advised the Petitioner that there were no other automatic rights to review his conviction and sentence and Petitioner stated he understood. *Id.* at 426. The court went on specifically to advise the Petitioner that even though he could change his mind at least for the time being, "there may be a limit to this." (J.A.

427). The court specifically stated, "but there very well could come a point between now and your date of scheduled execution, unless the court for some other reason prevented that, beyond which it could not be stopped. So, I just want you to understand that if for any reason you are not completely serious about your decision, you need to know the severity of the consequences. Of course, that sort of goes without saying that there could come a point when they could not be legally stopped." *Id.*

At the subsequent hearing on competency before the same court on March 28, 1990, the court again inquired of Petitioner whether he was making a knowing and voluntary decision and when he made the decision to waive his right to post-conviction review. Petitioner again reiterated that he did not want to proceed and even felt he should have had the right to waive his mandatory direct appeal. (J.A. 430). Later in that same proceeding, the court warned the Petitioner "that unless your execution is stayed by some other court that it could very well take place in a little more than 24 hours and that if you have any desire to change your mind at all, you need to make that decision at the earliest possible moment because there may come a time prior to execution in which you could not change that even if you then desired it." (J.A. 433). The court noted that at that point in time, if Petitioner filed a state habeas corpus petition raising claims requiring an evidentiary hearing, and if it were done early enough before the actual hour of the execution, a stay would more than likely be entered. *Id.* at 434. In that initial proceeding, the court and the parties acknowledged that Petitioner had the option to change his mind; however, the timing would be critical, with the court

again reiterating that "if he is playing games, so to speak, that it certainly could backfire because there could come a time when he could not change his mind. As long as he understands that, that's all the court can do." *Id.* at 437.

In the subsequent federal court proceedings in the next friend action filed by Petitioner's sister, *Lonchar b/n/f Kellogg v. Zant*, No. 1:90-CV-2336-JTC, the court inquired of the Petitioner if he understood the effect of his waiver of further appeals and the Petitioner stated, "I will be executed." (J.A. 442). Petitioner further reiterated that he understood that he was giving up the right to appeal the conviction and sentence. The court advised the Petitioner that he could change his mind up until the sentence was executed and Petitioner stated that he was aware of that, but "you can be assured that it won't happen." *Id.* at 447. The court did go on, however, to state, "[a]lthough if you abandon this proceeding you have to bring one in the future, but if you choose not to bring a habeas corpus proceeding in federal court, that is the last available means of relief that would be available to you from your sentence." *Id.* at 447.

The question again came up at the hearing on June 23, 1994, on Petitioner's request to dismiss the state habeas corpus petition he had filed, no. 93-CV-9. At that proceeding the court asked the Petitioner, "do you understand that if the court dismisses this petition, that if you changed your mind again that it might interfere with your filing another state habeas corpus petition?" (J.A. 462). Petitioner responded, "You don't have to worry about changing my mind again, I assure you." *Id.* The court again stated, "Do you understand that if I dismiss this petition, if you get upset thirty minutes before the

next time that there might not be anything that you can do about it?" *Id*. Petitioner responded, "That is right. You can take that right away." *Id*.

There were additional discussions at that hearing regarding a potential dismissal with prejudice with counsel for the Respondent stating, "I would like to be able to raise the dismissal of this petition as a procedural bar should Mr. Lonchar himself decide to proceed with another state habeas petition." (J.A. 467). The court responded, "I tried to make it perfectly clear when I was speaking with Mr. Lonchar that I consider this to be a final resolution of this now, before this particular court and I am functioning [sic] that he understood that." *Id*. at 468. The court later stated, "and I am not in the position to advise Mr. Lonchar." *Id*. at 469. Thus, at the conclusion of that hearing, the court made it clear that the court was advising Mr. Lonchar that he might not have the opportunity to refile any state proceeding or obtain a stay of execution in subsequent proceedings.

In the pleadings submitted subsequent to that hearing, the parties argued the possibility of dismissing the petition with prejudice. Petitioner seems to assert that the Respondent, by withdrawing the specific request for a dismissal with prejudice, acknowledged that Petitioner could file a state habeas corpus petition at any time he chose. A review of the pleadings shows that this is simply not accurate. In the response on the question of dismissal with prejudice, Respondent acknowledged that it was unclear under Georgia law whether a dismissal with prejudice would be appropriate under the specific circumstances of the case. "Respondent's concern is that the judicial system not be abused. Even if this petition is

dismissed without prejudice, if Mr. Lonchar decides to file a new petition, there would be questions raised about the appropriateness of that action." (J.A. 162). Thus, due to the ambiguity of state law, Respondent did not insist upon a dismissal with prejudice to avoid additional litigation and, "if necessary, allow subsequent courts to determine the effect of that dismissal on Mr. Lonchar's ability to pursue a state habeas corpus remedy." *Id*. Thus, no one in those proceedings stated that the dismissal of that petition would allow Mr. Lonchar to refile a state habeas corpus petition at any time under any circumstance and certainly did not suggest that he could again refuse to participate in a next friend petition and then subsequently again seek to stay his execution only hours before it was scheduled. The court clearly told Petitioner that she was not giving him advice about the possibility of a future petition and warned him that he might not be able to file a subsequent petition.

Thus, there was no advice given upon which Petitioner could have reasonably relied in relation to the state court proceedings. More specifically, no court ever advised the Petitioner that he could sit back and wait while two separate next friend actions were litigated, attempt to participate in a civil rights action, wait for yet another execution date to be set, wait for next friend proceedings to be litigated and then on the day his execution was scheduled, only hours before the execution, come in and attempt to stop the proceedings by filing yet another state habeas corpus petition.

Furthermore, in order to establish the concept of detrimental reliance, Petitioner must actually show he relied upon any of this "advice" in deciding not to file a

state or federal habeas corpus petition until the day of his scheduled execution in June of 1995. There is simply no evidence of reliance. In fact, that had absolutely nothing to do with Petitioner's decision not to file a petition until the last minute. In the district court, Mr. Lonchar simply stated that he had been convinced that he could save some people's lives and that he wanted to have the opportunity to do so. *Id.* at 512. The court specifically asked the Petitioner when he decided it was appropriate to delay his execution to have the opportunity to donate his organs and he stated the following:

> It's been a few years, since, you know, which, it just, so much logic [sic] to me. And so, but as far as the record for the court, you know, I was just informed of this a couple of weeks ago that if I did stay my execution that something could be done, you know, because honestly I didn't believe that anything could be done. . . . But I have been informed just recently. . . .

Id. at 514. Petitioner further stated that he had come to the conclusion within the last two weeks that there was something that might be done to change the method of execution and that was why he was in court on that date. (J.A. 515).

No one ever offered any explanation from Mr. Lonchar that his dismissal of his first state habeas corpus petition was based on any reliance on any representations that he could refile at any time, that his refusal to participate in any of the two state and two federal next friend habeas corpus actions was based upon any reliance on representations made to him by anyone that he could

simply again sit back and wait for the most recent execution date and file a petition at the last minute.

Petitioner has simply failed to show any detrimental reliance which would justify an application of basic estoppel principles to allow the instant petition to proceed. Petitioner has failed to show that he is entitled to rely upon this equitable principle to pursue a federal habeas corpus petition at this stage of the proceedings.

Petitioner also refers to advice allegedly given to him by counsel. Petitioner never told any court that he relied on any such advice in deciding on his course of action. Further, advice of counsel in a post-conviction proceeding would not require the application of estoppel principles, particularly when Petitioner is not even entitled to counsel at that stage of the proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Thus, Petitioner has not shown there was any reasonable reliance on advice or representations by anyone which would excuse his abusive conduct.

C. Motivation

Petitioner also asserts that the Eleventh Circuit Court of Appeals erred in giving weight to his motive for filing the proceedings when it decided to vacate the stay of execution. The basic premise behind Petitioner's argument is that this interferes with his constitutional right to access to the courts and that motivation is not considered as a bar in any other type of litigation. Respondent submits that based upon the equitable nature of habeas

corpus, motivation has been a long standing consideration in deciding whether petitioners should be allowed to proceed and was properly considered in this case.

Petitioner cites to several different cases dealing with motivation in pursuing litigation. Certainly, as a general principle, "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 741 (1983). In addressing specific legal issues, this Court has addressed the concept of motivation for litigation and its effect. The cases cited by the Petitioner, however, relate to statutory issues such as unfair labor practices and whether a retaliatory motive for filing litigation would substantiate a claim of an unfair labor practice, *Id.*, or the question of whether anti-competitive intent or purpose in pursuing litigation would be a "sham" for purposes of antitrust immunity. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, ___ U.S. ___, 113 S.Ct. 1920 (1993).

In the context of habeas corpus, and more specifically in the context of equity, however, motivation is a key factor considered by the courts. As noted previously and as set forth by this Court on numerous occasions:

> Habeas corpus has traditionally been regarded as governed by equitable principles. [Cit.] Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

Murray v. Carrier, 477 U.S. 478, 512 n. 18. Habeas corpus cases have frequently examined motivation. In *Wong Doo*

v. United States, the Court cited to the fact that the proof had not been presented earlier but had always been accessible as demonstrating the petitioner's "bad faith." *Id.* at 289; *see, Sanders v. United States*, 373 U.S. at 10. More specifically, in *Sanders*, this Court examined the question of deliberate abandonment of a ground in the prior petition and made the following oft-quoted holding: "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose *only purpose* is to vex, harass, or delay." *Sanders* at 18 (emphasis added). Therefore, this Court has clearly recognized that in equitable proceedings on a petition for a writ of habeas corpus, the purpose for filing the litigation is certainly a relevant consideration and not an impermissible restriction on the right of access to the courts.

This Court recognized a similar consideration in *Gomez v. United States District Court* noting, "equity must take into consideration the state's strong interest in proceeding with its judgment and [the plaintiff's] obvious attempt at manipulation." *Id.* at 654. To determine that there has been an attempt at manipulation, there obviously must be an inquiry into the motivation. The Court in *Gomez* went on to reemphasize that there was no good reason for the delay and referred to the last minute attempts to manipulate the judicial process. This is obviously a consideration of motive not only for filing the most recent petition, but the motive for not filing a petition earlier.

Respondent thus submits that the Eleventh Circuit Court of Appeals properly examined Petitioner's motivation and the purpose in filing this petition, which is

clearly only to delay his execution until such time as he can seek to have the method of execution changed, based upon his own admission that he will dismiss the petition subsequent to that time. This is a proper factor in considering an equitable doctrine and does not constitute a restriction on access to the courts.

Thus, none of the factors cited by the Petitioner undermine the validity of the holding of the Eleventh Circuit Court of Appeals in the unique procedural and factual posture of this case.

III. PETITIONER HAS NOT BEEN DEPRIVED OF NOTICE AS THE RULING BY THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT APPLY A NOVEL RULE OR CREATE A NEW RULE OF EQUITY.

Petitioner finally asserts that the ruling by the Eleventh Circuit Court of Appeals was a new rule, that he was not provided with notice of the application of this new rule, and that the court applied newly announced standards that he should not be required to satisfy. Respondent submits that the holding of the court in this case is no more than a restatement of equitable principles in existence for decades and did not state any new rule, and, thus, did not deprive Petitioner of notice.

This Court has frequently addressed the concept of novelty in the context of the application of either state procedural bars or holdings by this Court and in the context of determining the retroactivity of rulings by this Court. The Court has recognized that "[n]ovelty in procedural requirements cannot be permitted to thwart

review in this Court applied for by those who, in justifiable reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 457 (1958). Similarly, the Court has noted an exception to the cause and prejudice standard for examining procedural defaults when "counsel has no reasonable basis upon which to formulate a constitutional question. . . . " *Reed v. Ross*, 468 U.S. at 14. In that instance, the Court concluded that when the "constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16.

No such novel rule was applied in this case. As consistently noted, all the Eleventh Circuit Court of Appeals did was simply apply long standing principles of equity which have applied to habeas corpus cases for decades. Surely, Petitioner cannot be suggesting that he thought he was entitled to engage in abusive conduct by manipulating the courts, deliberately delaying the proceedings, and filing proceedings for the sole purpose of delay and other inequitable conduct. Nothing in any precedents of this Court even suggests that such conduct should be tolerated.

Therefore, Respondent submits that there is no new rule to be announced and no lack of notice to the Petitioner which would deny him due process. This Court should, therefore, apply equitable principles to find Petitioner is barred from pursuing this habeas corpus action.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the judgment and verdict of the Eleventh Circuit Court of Appeals vacating the stay of execution entered by the district court be affirmed and that this Court vacate the stay of execution previously entered and allow the state court to proceed with Petitioner's lawfully imposed sentence of death.

Respectfully submitted,

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